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THE CASE

OF THE

REPUBLIC OF NICARAGUA

SUBMITTED TO HIS EXCELLENCY

HON. GROVER CLEVELAND,

President of the United States,

ARBITRATOR,

UNDER THE TREATY OF GUATEMALA OF DECEMBER 24TH, 1886.

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WASHINGTON, D. C.
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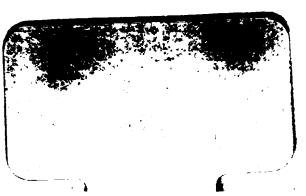

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INTRODUCTION.

THE Government of Nicaragua, in presenting to His Excellency the President of the United States HER CASE under the provisions of the treaty of Guatemala, of December 24, 1886, with the Republic of Costa Rica, congratulates herself upon the acceptance by His Excellency the President of the post of Arbitrator, and conveys to him her grateful sentiments for thus aiding in an amicable adjustment of her differences with the Republic of Costa Rica, and accepts it as an additional token of the good will and kindly interest which His Excellency feels in the welfare of both Republics.

STATEMENT.

The questions presented for the determination of His Excellency the President of the United States, the Arbitrator chosen by the treaty between the governments of Nicaragua and Costa Rica of Dec. 24, 1886 (Appendix "A"), is—

FIRST. Whether the treaty signed by both on the 15th day of April, 1858 (Appendix "B"), is or is not valid; and

SECOND. Should the validity of the treaty be established, whether under its terms Costa Rica has the right of navigation of the river San Juan with vessels of war or of the Revenue Service, and such other questions of interpretation as may be submitted under the provisions of paragraph six.

The argument upon these latter questions on behalf of Nicaragua is reserved, pending the discussion and decision of the leading question, that Government holding herself in readiness to submit such argument whenever the Arbitrator shall signify his readiness to enter upon that question should its discussion become necessary.

ARGUMENT.

The Government of Nicaragua affirms the invalidity of the treaty of 1858, and insists that it ought not to be bound thereby, for the reason—

First. That it has not received that sanction which the Constitution of the State of Nicaragua requires to give effect to, and validate, a treaty of its character.

Second. It has not been ratified by the Government of San Salvador, so as to give effect to the guarantees on behalf of that Government of the tenth article of the treaty.

Third. That the pretended ratifications of the treaty were exchanged before the treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first

Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratification in article XII.

FIRST.

It must be conceded that, in determining the validity of a treaty made in the name of a State, the fundamental laws of such State must furnish the guide for such determination. This question is stated thus in Vattel's Laws of Nations, chapter XII, page 193:

"The sovereign who possesses the full and absolute authority has, doubtless, a right to treat in the name of the State he represents, and his engagements are binding on the whole nation. But all rulers of States have not the power to make public treaties by their own authority alone; some are obliged to take the advice of a Senate, or of the Reprerentatives of the nation. *It is from the fundamental laws of each State that we must learn where resides the authority that is capable of contracting with validity in the name of the State.*"

The alienation of a portion of the territory of a State, which we shall presently show would be the effect of the treaty of 1858, is reserved by nearly all nations to the nation itself. And it is laid down by Vattel that a treaty pernicious to the State is null, and not at all obligatory, as no conductor of a nation has the power to enter into engagements to do such things as are capable of destroying the State, for whose safety the government is intrusted to him (Vattel, p. 194).

And the same author cites, as illustrative of the invalidity of a treaty of this character, the failure of the Emperor Charles V to procure the ratification of the treaty of Madrid made with Francis I by the States-General of France, whereby, says the author, the Emperor lost the fruits of his victory by an oversight which appears very surprising in a prince of his abilities (Vattel, p. 432).

The renunciation of Maria Theresa, not having been confirmed by the General Assembly of the Cortes, and consequently not stamped with the National approbation and the character of a law of the State, was held void by the cardinals who examined the affair by order of the Pope at the request of Charles II, not deeming it of sufficient force to invalidate the laws of the country and to supersede the established customs (Memoirs of M. de St. Phillipe, vol. 1, p. 29, edition of 1797).

The fundamental law of the State of Nicaragua in force in 1858 was contained in her written Constitution adopted in 1838, and the paramount force of such Constitution as against any treaty must be conceded under all constitutional Republics.

"The Constitution is to prevail over a treaty where the provisions of one come in conflict with the other. It would be difficult to find a reputable lawyer in this country who would not yield a ready assent to this proposition," says Mr. Secretary Marcy, in his letter to Mr. Mason of September 11, 1884 (Wharton's International Law Digest, vol. 1, p. 68, sec. 138).

"This principle, the President directs me to say, he cannot disavow, nor would it be candid in him to withhold an expression of his belief that if a case should arise presenting a direct conflict between the Constitution of the United States and a treaty made by authority thereof, and be brought before our highest tribunal for adjudication, the court would act upon the principle that the Constitution was the paramount law" (Secretary Marcy to Mason, *idem*, *supra*).

The Constitution of the State of Nicaragua defines her boundaries in Article II, viz:

"ART. II. The territory of the State is the same that was comprised within the Province of Nicaragua; its boundaries are: On the east and northeast, the Caribbean Sea; on the north and northwest, the State of Honduras; on the west and south, the Pacific Ocean; and on the southeast, the State of Costa Rica."

What were, then, the BOUNDARIES OF NICARAGUA as thus defined by her Constitution?

It is a historical fact that the Province of Nicaragua reached towards the south as far as the river called "El Salto," and hence comprised what was named during the Spanish rule the "District of Nicoya," and at the same time possessed towards the north the "Desaguadero" (outlet of the lake), or "San Juan" river, and all the adjacent lands. The following documents confirm this:

In the title of Alcalde-Mayor of the Province of Nueva-Cartago and Costa Rica, extended by King Philip the Second of Spain, in favor of Licentiate Juan Cavallon, dated 17th of May, 1561, we read the following:

"We appoint you, said Licentiate Cavallon, our Alcalde-Mayor of all the said land that has been mentioned, by which is meant from the limits of the town of Nicoya (of the said Province of Nicaragua) forward, and of the cities, villages, ports and places which up to this date you have discovered," &c., &c., &c. (Peralta's Costa Rica, Nicaragua, and Panama, published by Costa Rica, with authenticated copies of royal grants, from Spanish Archives of the Indies, p. 196).

In the title of "Governor and Captain-General of Costa Rica," given by the same monarch to Diego de Artieda, and constantly quoted by Costa Rican writers as the most efficient proof of the pretended rights of Costa Rica over the territory in dispute, we find what follows:

Firstly. "We give you faculty to discover and settle and pacify the said Province of Costa Rica and the other lands and provinces that are enclosed within it, which is from the Northern to the Southern Sea in latitude, and in longitude from the limits of Nicaragua, on the side of Nicoya, straight to the valleys of Chiriqui, as far as the Province of Veragua, in the South; and towards the North, from the mouths of the Desaguadero, which is on the side of Nicaragua, all the land as far as the said Province of Veragua," &c., &c. (Peralta's Costa Rica, Nicaragua, and Panama, p. 513).

Nicoya then belonged to Nicaragua, according to the very text of these royal letters.

If the boundaries of Costa Rica commenced at the southern limit of Nicaragua *on the side of Nicoya*, it is evident that this district belonged to the latter, for otherwise the royal document would have declared that it was comprised within the territory given to Diego de Artieda as Governor of Costa Rica. This last title confirms what was established in the other one; that is, that the district of Nicoya formed part of the Province of Nicaragua.

On the northern side the limits of Costa Rica are established with these precise words:

"From the mouths of the Desaguadero, which is on the side of Nicaragua, all the land," &c.

According to this title, the Desaguadero (outlet of the lake), or San Juan river, is entirely within the limits of Nicaragua. This river has three mouths—called San Juan, Taure, and Colorado. This last one being the southernmost, is the one that ought to mark the limits between the two countries, for to say that the Desaguadero belongs to Nicaragua in the *whole of its course*, and then to pretend that one of its three mouths—the so-called Colorado river—forms part of Costa Rica, is a statement that could hardly bear an impartial examination.

So, then, the royal letters of King Philip the Second of Spain, in which Costa Rica pretends to find a support to her territorial claims, declare that not only the district of Nicoya but also what was named Desaguadero, and is now the San Juan river, including the Colorado, as a portion of the said Desaguadero, formed part of the Province of Nicaragua.

During the Spanish rule the defence of the Desaguadero was committed to the Governor of Nicaragua, and, in pursuance of the duty thus imposed on him, the Governor of that Province built fortifications at the mouths of the De-

saguadero and maintained garrisons therein (Ayon's History of Nicaragua, vol. II, p. 339).

In a report addressed to the King of Spain by Don Diego de la Haya, Governor of Costa Rica, dated 15th of March, 1719, he says:

"The capital is Cartago, a city situated in the midst of this valley, which is the centre of the whole province, for the distance from the port of Matina to this city is 30 leagues, and another 30 from this city to the port of Caldera—this, as far as the latitude is concerned; and as far as the longitude from said city to the town of Boruca, the distance is of 80 leagues, and the same from there to the 'Rio del Salto,' which divides this jurisdiction from that of Nicaragua." (Memoirs of Archbishop Garcia Pelaez, History of Guatemala, vol. III, pp. 33–38).

No more authorized word could be found than that of the Governor of Costa Rica, and he places Nicoya within the territory of Nicaragua, by saying that the limits of the former did not extend beyond the "Rio del Salto."

The historian Herrera, whose authority is recognized the world over, and who wrote under the reign of Philip the Third of Spain, speaking about the expeditions of Hernán Ponce and Bartolomé Hurtado, expresses himself in this wise:

"After having traveled over fifty leagues, they found a gulf of overy twenty, which the Indians called 'Chira' and the Castillians 'San Lucar,' which is now named port of Nicoya, the latter being a province of Nicaragua, very fertile and beautiful" (Decade II, Book 2, chap. 10, p. 38).

In a report addressed by the engineer Don Luis Diez Navarro to the Marquis of Pozo Blanco, under date of May 30th, 1744, is the following:

"Where the jurisdiction of Nicoya ends, begins that of Costa Rica, in a place called the 'Rio del Salto,'" &c. (Ayon's History of Nicaragua, Vol. II, p. 332).

Don Antonio Alcedo, in his "Geographic and Historical Dictionary," published in 1788, speaks of Nicoya thus:

"It is a province and alcaldia mayor of the kingdom of Guatemala, in Central America. Its limits are: On the east, Costa Rica; on the north, Lake Nicaragua; on the west and south, the Pacific Ocean. It covers a very small area of land, and is recognized as a portion of the Province of Nicaragua, whose Governor appoints the alcalde-mayor as one of his lieutenants."

In "The Essay on the Political and Ecclesiastical Condition of the Kingdom of Guatemala," containing a project for the division of the country into eight provinces, presented to the Spanish Cortes by Dr. José Mariano Mendez, Representative of the District of Sonsonate, which essay was printed in 1821, the writer mentions the condition of the kingdom, and speaks of the districts and towns which ought to be separated from one province and added to another. Referring to Nicaragua and Costa Rica (pp. 336),* he proposes the separation of Nicoya from the former to be added to the latter, clearly showing that up to that time the said district had not belonged to Costa Rica.

The last Spanish Governor of Nicaragua, Don Miguel Gonzales Saravia, in his "Political and Statistical Sketch," published in 1823, speaking of this province, says:

"It is limited on the north by the Gulf of Amapala, the Province of Honduras and the mountains and territories occupied by the Mosquito Indians; on the east by the Caribbean Sea; on the south by the Province of Costa Rica, the line of division being 'the Rio del Salto,'" &c. (Ayon's History of Nicaragua, p. 337).

Again, it is shown that Nicoya is comprised within the limits of Nicaragua, the Rio del Salto being a small stream

*Ayon's History of Nicaragua.

that empties into the Gulf of Nicoya, and divides this province from that of Costa Rica.

The historian Juarros, referring to Nicaragua and Costa Rica, in his "Statistical and Commercial History of the Kingdom of Guatemala," writes as follows:

"The Intendency of Nicaragua contains five districts: Of these, Leon, which is the first, was formerly considered a Government; the others, Realejo, Subtiava, Matagalpa, and Nicoya, were corregidorships" (Treatise I, Chap. III, p. 60).

And further on he adds (p. 72):

"The District of Nicoya is the eastern part of the Intendency of Nicaragua, on the coast of the Pacific: it has Subtiava on the west, the Lake of Granada (Nicaragua) on the north, the Government of Costa Rica on the east, and on the south the ocean."

And the same historian says of Costa Rica (p. 73):

"The most oriental province of the kingdom is Costa Rica. It extends from the 'Rio del Salto,' which divides its territory from that of Nicaragua," &c.

By all the historical quotations above referred to, it is proved beyond any doubt that what was called the district of Nicoya, as well as the Desaguadero or San Juan river, with its three mouths, belonged to Nicaragua during the whole period of the Spanish domination in Central America.

So far as Nicoya is concerned, this is virtually admitted in Peralta's Costa Rica, Nicaragua, and Panama, a work published by the authority of the Government of Costa Rica, in the following language in a foot-note by M. Peralta on page 500:

"The province of Nicoya was definitively added to Costa Rica in the year 1825."

What sanction this statement has will be presently examined. It stands, however, as an authoritative concession,

that up to that time—four years after the Independence—Costa Rica had not possessed this district.

Let us now bring to memory what happened after 1821—the year in which our independence was proclaimed.

The principle of the *uti possidetis* having been recognized in Central America as the basis of our future international life, each State preserved the same territory it had possessed during the colonial times; and in consequence, the district of Nicoya remained united to Nicaragua. This was admitted by Costa Rica; for in her Constitution, issued on the 21st day of January, 1825, she declares that the "*Rio del Salto*" is the limit between the two countries, thus leaving Nicoya on the side of Nicaragua; and it is a notorious fact in our history that the said district voted with the now department of Rivas in the election of a deputy to the Legislature of Nicaragua of 1826 (Appendix "D").

So far as the pretended annexation of the District of Nicoya to Costa Rica in 1825, to which Mr. Peralta refers in the foot-note before cited, is concerned, the facts are as follows:

When the first Federal Congress of Central America met, Costa Rica applied to it to obtain the District of Nicoya, and Nicaragua not being at that time represented in that assembly, that body declared, on the 9th of December, 1825, that the said district should remain *temporarily* under the dominion of Costa Rica, awaiting the result of a final demarkation; this never took place. Against the above resolution of the Congress the Assembly of Nicaragua protested as soon as it met, claiming the District of Nicoya, and the municipalities of the latter expressed themselves in the same manner, having refused in a public act, signed on the 15th of August, 1826, to recognize the Constitution of Costa Rica (Appendix "D").

At the same time Nicaragua declared in her Constitution that the District of Nicoya, as well as all the lands on the right side of the San Juan river, were part of her dominion.

Later on, in the year 1848, while Nicaragua was discussing with Great Britain about her rights on the Mosquito coast and the Port of Greytown, Costa Rica never advanced any claim, either officially or otherwise, to the territory now under consideration; but on the contrary, in the conferences which the same year took place between plenipotentiary ministers of both Republics, the Costa-Rican envoy proposed, as a settlement of the boundary difficulty, that a belt of land three leagues wide should remain to Nicaragua on the right bank of the San Juan river, as well as along the southern shore of the lake, thus admitting that Costa Rica had no right to the waters of either; and what is more, the same official proposed, in the name of his Government, to give Nicaragua a considerable indemnity for a portion of the land which Costa Rica pretends now to have always possessed (Proposition of Don Felipe Molina, envoy of Costa Rica to Nicaragua in 1848).

The absolute sovereignty of Nicaragua over the river San Juan and adjacent lands has been always recognized, and proof of it is found in the fact that the Republic has on more than one occasion celebrated contracts of canal and transit through her territory, in which both banks of the river have been touched, and previous to 1858, the year in which the treaty under consideration was signed, never did Costa Rica protest, as she would surely have done had her territory been encroached upon.

For example, "Article 27" of the "Contract between Nicaragua and the American Atlantic and Pacific Ship Canal Company," signed on the 24th of August, 1849, provided as follows:

"The State of Nicaragua, with the object of facilitating the colonization of the lands contiguous to the river San Juan and the adjacent rivers, and of the canal which in or along it may be constructed, makes a free donation to the company of eight stations or sections of land to be located at such points upon *either one or both of the banks* of the said

river or canal as the company may elect, each one of which stations shall be of six English miles in length, fronting upon the river or canal, and six miles in width, measured from the bank of the canal or river towards the interior," &c.

In the work of E. G. Squier, formerly Chargé d'Affaires of the United States to the Republics of Central America, on Nicaragua, published in 1853, that author, on page 22, volume 1, defines the boundaries of Nicaragua to be—

"The Caribbean Sea upon the east, extending from the lower or Colorado mouth of the San Juan river to Cape Gracias a Dios; and upon the west, the Pacific ocean from the gulf of Nicoya to that of Fonseca, embracing about one-third of the latter. * * * The southern boundary, separating it from Costa Rica, runs in a right line from the mouth of the river Salto de Nicoya, or Alvarado, emptying into the head of the gulf of Nicoya, to the lower mouth of the San Juan river. * * * A claim to another large section of Nicaragua, including the entire department of Guanacaste, or Nicoya (lying between lake Nicaragua and the gulf of Nicoya), as also to the entire country south of the lake just named and the river San Juan, has *recently* been asserted by Costa Rica; but neither the pretensions of Great Britain or Costa Rica are well founded, nor are they admitted by Nicaragua or recognized by civilized nations."

In a map published with this work, the boundary line established by the Constitution of Costa Rica of 1825 is delineated, and is in accordance with the statement of this author above cited.

The rights which Costa Rica pretends to have always had over the waters of the San Juan have not been recognized by other nations, and as a demonstration of this statement I will quote a communication addressed by General Cass, as Secretary of State, to Lord Napier, British Minister in Washington. It is dated October 20, 1857. It begins thus:

"I have had the honor to receive your lordship's communication of the 9th instant in reference to the existing rela-

tions between Nicaragua and Costa Rica, and have submitted it to the consideration of the President. These relations have attracted the earnest attention of the President, not only from the importance of the San Juan transit to the commerce of the world, but from the interest which is naturally felt by the United States in the neighboring republics of this continent. The President has witnessed, therefore, the restoration of peace to Nicaragua and Costa Rica with the highest gratification, and he sincerely hopes that it may not again be interrupted either by the calamity of civil war or the invasion of their territory from other countries. Their security and wellfare would undoubtedly be promoted by a just and friendly settlement between them of their mutual boundaries and jurisdiction, and I need hardly add that such an adjustment would be viewed with satisfaction by the United States. This Government, however, *has never admitted the pretensions* of Costa Rica to an equal control with Nicaragua of the San Juan river, but has regarded the sovereignty of the river, and consequently of the interoceanic transit by that route, as rightfully belonging to the Republic of Nicaragua."

Submitted herewith is a sketch map, upon which are delineated the claimed boundary of 1858 and the other boundaries, as appears upon various maps of approved authority issued prior to that date, which presents a graphic description of the territory lying between the original boundary of Nicaragua and the 1858 boundary.

It follows, therefore, that Nicaragua lost by the treaty of April 15, 1858, a large portion of territory, over which she had exercised absolute dominion during the colonial times, as well as after her independence from Spain.

Let us now pass to consider the treaty of 1858, and see what its origin was. The war that the five republics of Central America had been obliged to sustain against Walker's filibusters was just over, and Nicaragua, having been the theatre of that bloody struggle, was left more prostrate by it than any one of her sister republics. Under these circumstances, Costa Rica thought that the moment had arrived for her to take possession, by sheer force, of a portion of the

Nicaraguan territory, which all diplomatic efforts had failed to secure for her. Without any declaration of war, the President of Costa Rica invaded Nicaragua and occupied the river San Juan. Such flagrant violation of international rights was naturally looked upon as a *casus belli*, and at once put the two republics in a state of war, to the great regret of Nicaragua, for both the people and the Government entertained only the warmest feelings of gratitude towards the neighboring Republic for the important services she had just rendered to the cause of the independence of Central America. The hostilities were about to open when the Republic of San Salvador, wishing to avoid further bloodshed in Central America, offered its friendly mediation, and proposed a meeting of plenipotentiaries at San José, capital of Costa Rica, where, besides the representatives of the two contending parties, an envoy of San Salvador would be present as mediator.

In the desire to meet the friendly advances of the Government of San Salvador, and wishing to avoid a war which, under the existing circumstances, might have been disastrous to her, Nicaragua accredited a minister to San José, and there the treaty of the 15th of April was signed, a treaty which was imposed upon, rather than accepted by, Nicaragua's Executive.

If, therefore, as we have shown, the treaty of 1858 curtails these boundaries and annexes to the State of Costa Rica any portion of the territory of Nicaragua, it is clearly a treaty in direct and flagrant violation of the fundamental law of that State, and to have validity must receive the same formal ratification that an amendment to the Constitution itself demands.

Article 194 of the Constitution of 1838 declares the procedure in such a case to be as follows, viz:

"If at any time it were deemed convenient to make any alteration of, or addition to, any articles of this Constitution, this can be done by observing the following rules:

"1st. The project of reform or addition must be presented in writing, signed at least by three deputies or three senators in their respective chamber, and must be read twice with the interval of eight days; 2d. Once admitted to discussion, it must pass to a commission, whose report must be presented after the lapse of twelve days; 3d. The resolution arrived at by the commission must be read twice with the same interval as the project was; 4th. The reform or addition must be approved by two-thirds of the votes of members of both Houses that may be present; 5th. Once the project approved, in the manner established above, the reform or addition shall not be considered as valid, nor form part of the Constitution, until it has received the *sanction* of the next Legislature."

That such ratification never took place is not a disputed fact, and the validity of the treaty is asserted, not upon the ground that its ratification had been made as directed by the Constitution of Nicaragua, but that the approval that it did receive was sufficient to give it force.

If this principle was admitted, to wit, that a ratification other than that eatablished by the fundamental law of the country, can give effect to a treaty, it would overthrow well-established rules of public law hereinbefore cited, and be productive of constant and interminable strife among nations, for it never could be agreed which of the forms might be omitted, or what could be held to be an equivalent of the omitted requirement.

It is perfectly well known that the treaty of April 15, 1858, was approved by the Constitutional Assembly of Nicaragua, and equally so that it has never been ratified by a second Legislature, as it should have been to become a law of the Republic. The very fact that such treaty deprives the nation of a portion of its territory, thus altering the text of the Constitution, made it indispensable that it should have received the sanction of a second Legislature, to be then admitted as an amendment to the National Chart.

And such have been undoubtedly the feelings entertained by Costa Rica in this matter; for she has always maintained

that the fact that the Assembly which appproved the treaty was invested with the character of a constitutional body, made it unnecessary to submit it to another Legislature for its ratification.

The Assembly, however, acted as an ordinary Legislature in approving the treaty, and declared it so in its own decree, which reads as follows:

"The Constitutional Assembly of the Republic of Nicaragua, in virtue of its *legislative* faculties, decrees: The treaty of limits celebrated in the city of San José on the 15th of April of the present year is approved," &c. (Appendix "C").

And to demonstrate more clearly, if possible, that the Constitutional Assembly never intended by its mere approval to make of the treaty a law of the Republic, it will suffice to recollect that in the new Constitution, issued only a few months afterwards by the same legislative body, the limits of Nicaragua are said to be the same as those of the old province of that name, which could not have been the case had the treaty been duly ratified; for we have seen that it deprived the Republic of the whole District of Nicoya, and of a considerable extent of land on the right bank of the San Juan river. If the Assembly had for one moment entertained the idea that its decree was going to make of the treaty a law of the nation, the Constitution published under date of 19th August, 1858, would have established the new limits of Nicaragua; but it was not so. And the mere fact of approving the treaty, and yet defining in the new chart the limits of the Republic as those of the province of Nicaragua under the Spanish domination, shows, in an unmistakable manner, that the Assembly meant to leave the sanction of the said treaty to the consideration of the next Legislature. Such sanction, however, was never had by a second Legislature.

SECOND.

The 9th article of the treaty of 1858 (Appendix B, p. 37) provides that no act of hostility towards each other shall be

practiced in the port of San Juan de Nicaragua, nor on the San Juan river, or on Lake Nicaragua; and the fulfilment of this article is guaranteed by San Salvador in Article X (Appendix B, p. 37). The 12th article of the treaty provides for its ratification.

That the treaty never was ratified by the Republic of San Salvador will not be denied, and hence this guarantee never took effect.

In the construction of treaties the general doctrine is that any special advantage conceded by a party under any one article is in consideration of all the advantages enjoyed by the same party under that and all other articles of the treaty (Opinion Att'y-Gen'l Cushing, 6 Opin. 148).

The guarantee of the mediating government, that even in case of actual war no act of hostility should be practiced on Lake Nicaragua, the San Juan river, or the port of Greytown, against Nicaragua, was of great importance to that State. It might well have been a controlling consideration in the mind of the negotiator of the treaty, that led him to agree to other articles relinquishing great tracts of the territory. Nearly the whole of the internal commerce of Nicaragua would have been protected from devastation by this guarantee in case of war. San Salvador would have been the ally of Nicaragua to enforce this provision. The failure, then, of San Salvador to ratify this treaty took from it one of the chief considerations moving to Nicaragua. It may be said to be the only consideration that, by the terms of that treaty, Nicaragua was to receive for all the territory that was to pass to Costa Rica. If, then, the consideration never took effect; if San Salvador never became bound to do that which it was expected she would obligate herself to do, upon every principle of equity, the consideration having failed, the treaty could not become of valid or binding force.

It would indeed be inequitable to require Nicaragua to recognize as valid a treaty when the consideration never became valid by the ratification of it by the mediating Government.

It was, in effect, a tripartite treaty; and unless all the parties became bound, neither of them was. It was indivisible; it must all stand or all fall together; and having shown that a provision of such grave importance to Nicaragua failed for want of ratification by San Salvador, it is confidently urged that, for this reason alone, the treaty never had any validity.

THIRD.

The treaty was exchanged even before it was approved by the Assembly; and here we find another argument to warrant the Government of Nicaragua in not accepting its validity. Article 12 of the said Convention reads thus:

"This treaty shall be ratified, and the ratifications exchanged, within the space of forty days, in the city of Managua."

The exchange, however, took place on the 26th of April of the same year, between the Presidents of Nicaragua and Costa Rica, and the treaty was approved, *not ratified*, by our Congress, on the 4th of the following June, when thirty-eight days had already elapsed since the date of the exchange; and, what is more, the day the Assembly gave the decree approving the Convention, the forty days set down in the article quoted above as the space within which the exchange was to take place had already passed.

We have seen by the above that the treaty of April 15, 1858, not only is wanting in the ratification of our Congress to be admitted as a law of the Republic of Nicaragua, but has another source of nullity in the fact that it was exchanged before having been submitted to the consideration of our legislative power.

It will be observed that the pretended ratifications were exchanged prior even to the approval by the first Legislature of Nicaragua, which tends to strengthen the statement hereinbefore made, that the "treaty was imposed upon rather than accepted by Nicaragua." The haste with which it was sought to be concluded, without even the attempt to

secure its constitutional ratification, lost to Costa Rica, as the treaty of Madrid lost to Charles V (*supra*), the fruits of the negotiation.

It cannot be claimed that the failure of the Legislature to approve the treaty within the forty days provided in Article XII could be waived by Costa Rica, for no attempt to exchange ratifications was made after the approval, and the time for the exchange was never extended; the exchange was the act of the President made without constitutional sanction, and was without force to bind the nation.

The Government of Nicaragua has continuously and earnestly asserted for years the invalidity of the treaty of 1858, and consistently held this position; by no act of hers during all this time has she estopped herself to deny its validity.

In 1871 the President of Costa Rica invited the President of Nicaragua to a conference in the city of Rivas, the object of which was, among other things, to discuss in a friendly manner the boundary question. On that occasion the President of Nicaragua frankly exposed the views of our country about the treaty of 1858, and the President of Costa Rica requested that a project for a new Convention should be presented to him by Nicaragua, so as to come to a final settlement of the difficulty, and with this object in view he accredited a minister plenipotentiary near our Government. No arrangement could be agreed upon, as Costa Rica would not accept the draft of a treaty presented to her, but the steps she took in the sense of an adjustment of the boundary question, not based upon the Convention of 1858, show that she tacitly acknowledged the nullity of this document.

In 1882 another legation was accredited by Costa Rica to Nicaragua for the purpose of negotiating a treaty of boundaries between the two countries; and although such a treaty was agreed upon by the negotiators, defining a very different boundary than that of 1858, the Government of Costa Rica declined to ratify said treaty.

Only a few months ago the President of Nicaragua, wishing to bring to an end the old boundary dispute between

this Republic and that of Costa Rica, agreed to sign a treaty with the President of the latter, which was to be submitted to the consideration of the Congresses of both countries. It was stipulated in this Convention, at the request of Costa Rica, that the treaty of 1858 should be presented to our Congress for ratification; to which the President of Nicaragua acceded in a patriotic spirit of conciliation, although well aware of the valuable concession he was granting. The new treaty came before our Congress, but was rejected, and matters remained in exactly the same condition they were before. However, the steps taken by Costa Rica on this occasion to obtain from our Congress a ratification of the treaty of April 15th, 1858, evidently demonstrates that she admits, although refusing to avow it, that the said Convention can never be a law of our country until it is duly and formally ratified.

For these reasons Nicaragua has refused to accept as valid the treaty of April 15th, 1858, and I do not hesitate to believe that His Excellency the President of the United States will give them his careful consideration. Whatever his decision may be, Nicaragua will receive it with satisfaction, for there is nothing she so earnestly desires as to bring to an end the differences between her and her sister, the Republic of Costa Rica, being fully aware that those boundary questions have contributed a great deal to paralyze the progress of the two nations, called to a brilliant future by their exceptional geographical position.

HORACIO GUZMÁN,
Envoy Extraordinary and Minister Plenipotentiary of Nicaragua.

J. E. MCDONALD,
R. J. BRIGHT,
JNO. C. FAY,
Of Counsel.

WASHINGTON, D. C.,
October 27, 1887.

APPENDIX.

APPENDIX "A."

Convention between the Governments of Nicaragua and Costa Rica to submit to the arbitration of the Government of the United States the question in regard to the validity of the treaty of 15 *April*, 1858.

The Governments of the Republics of Nicaragua and Costa Rica desiring to terminate the question debated by them since 1871, to wit:

Whether the treaty signed by both on the 15th day of April, 1858, is or is not valid, have named, respectively, as plenipotentiaries, Señor Don José Antonio Roman, envoy extraordinary and minister plenipotentiary of Nicaragua, near the Government of Guatemala, and Señor Don Ascension Esquivel, envoy extraordinary and minister plenipotentiary of Costa Rica, near the same Government, who having communicated their full powers, found to be in due form, and of conference with the mediation of the minister for foreign affairs for the Republic of Guatemala, Doctor Don Fernando Cruz, designated to interpose the good offices of his Government, generously offered to the contending parties and by them gratefully accepted, have agreed to the following articles:

(1) The question pending between the contracting Governments in regard to the validity of the treaty of limits of the 15th of April, 1858, shall be submitted to arbitration.

(2) The arbitrator of that question shall be the President of the United States of America. Within sixty days following the exchange of ratifications of the present convention, the contracting Governments shall solicit of the appointed arbitrator his acceptance of the charge.

(3) In the unexpected event that the President of the United States should not be pleased to accept, the parties shall name, as arbitrator, the President of the Republic of Chili, whose acceptance shall be solicited by the contracting Governments within ninety days from the date upon which the President of the United States may give notice to both Governments, or to their representatives in Washington, of his declination.

(4) If, unfortunately, the President of Chili should also be unable to lend to the parties the eminent service of accepting the charge, both Governments shall come to an agreement for the purpose of electing two other arbitrators within ninety days, counting from the day on which the President of Chili may give notice to both Governments, or their representatives in Santiago, of his non-acceptance.

(5) The proceedings and terms to which the decisions of the arbitrator are limited shall be the following:

Within ninety days, counting from the notification to the parties of the acceptance of the arbitrator, the parties shall present to him their allegations and documents. The arbitrator will communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party may be able to answer them within the thirty days following that upon which the same shall have been communicated.

The arbitrator's decision, to be held valid, must be pronounced within six months, counting from the date upon which the term allowed for the answers to the allegations shall have expired, whether the same shall or shall not have been presented.

The arbitrator may delegate his powers, provided that he does not fail to intervene directly in the pronunciation of the final decision.

(6) If the arbitrator's award should determine that the treaty is valid, the same award shall also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service. In the same manner he shall decide, in case of the validity of the treaty, upon all the other points of doubtful interpretation which either of the parties may find in the treaty, and shall communicate to the other party within thirty days after the exchange of the ratifications of the present convention.

(7) The decision of the arbitrator, whichsoever it may be, shall be held as a perfect treaty, and binding between the contracting parties. No recourse whatever shall be admitted, and it shall begin to have effect thirty days after it shall have been notified to both Governments, or to the representatives.

(8) If the invalidity of the treaty should be declared, both Governments, within one year, counting from the notification of the award of arbitrator, shall come to an agreement to fix

the dividing line between their respective territories. If that agreement should not be possible, they shall, in the following year, enter into a convention to submit the question of boundaries between the two republics to the decision of a friendly government.

From the time the treaty shall be declared null, and during the time there may be no agreement between the parties, or no decision given fixing definitely the rights of both countries, the limits established by the treaty of the 15th of April, 1858, shall be provisionally respected.

(9) Meanwhile, the question as to the validity of the treaty shall not be decided, the Government of Costa Rica consents to suspend the observance of the decree of the 16th of March last as regards the navigation of the river San Juan by a national vessel.

(10) In case the award of the arbitrators should decide that the treaty of limits is valid, the contracting Governments, within ninety days following that upon which they may be notified of the decision, shall appoint four commissioners, two each, who shall make the corresponding measurements of the dividing line, as provided for by article 2 of the referred to treaty of 15th April, 1858.

These measurements and the corresponding land-marks shall be made within thirty months, counting from the day upon which the commissioners shall be appointed. The commissioners shall have the power to deviate the distance of one mile from the line fixed by the treaty, for the purpose of finding natural limits or others more distinguishable. But this deviation shall be made only when all of the commissioners shall have agreed upon the point or points that are to substitute the line.

(11) This treaty shall be submitted to the approval of the Executive and Congress of each of the contracting Republics, and their ratifications shall be exchanged at Managua or San José de Costa Rica on the 30th of June next, or sooner if possible.

In testimony of which, the plenipotentiaries and the minister of foreign affairs of Guatemala have signed and sealed with their private seals, in the city of Guatemala, this 24th day of December, 1886.

J. ANTONIO ROMAN,
ASCENSION ESQUIVEL,
FERNANDO CRUZ.

APPENDIX "B."

Boundary Treaty of 1858 *between Costa Rica and Nicaragua.*

SAN JOSÉ, *April* 15, 1858.

I, Maximo Jerez, minister plenipotentiary of the Government of the Republic of Nicaragua, and I, José Maria Cañas, minister plenipotentiary of the Government of the Republic of Costa Rica, commissioned by our constituents to form a boundary treaty for both Republics, which may put an end to the differences which have retarded the better and more perfect understanding and harmony which should prevail between them, for their common security and aggrandizement; having exchanged our respective powers, after the examination made of them by the honorable Señor Don Pedro R. Negrete, minister plenipotentiary of the Government of the Republic of Salvador, in the exercise of his powers as brotherly mediator in these negotiations, who found them good and in due form; as in like manner were found by us those exhibited by the said minister; having discussed the respective points with due deliberation, with the aid and assistance of the representative of Salvador, we have agreed upon and drawn up the following:

Boundary Treaty between Nicaragua and Costa Rica.

ARTICLE I.

The Republic of Nicaragua and the Republic of Costa Rica declare in the most decided and solemn terms that if for a moment they were about to prepare to fight each other on account of boundary controversies and for reasons which each one of the high contracting parties considered lawful and honorable, they now, after repeated proofs of good understanding, pacific principles, and true confraternity, desire and formally pledge themselves to endeavor that peace, happily re-established, may each year be more and more consolidated between the two Governments and between the two nations, not only for the benefit and welfare of Nicaragua, and Costa Rica, but for the happiness and prosperity which in a certain sense redound to the advantage of the other, our sister Republics of Central America.

ARTICLE II.

The dividing line between the two Republics, beginning at the North Sea (Caribbean Sea), shall start at the extremity

of Punta de Castilla, at the mouth of river San Juan de Nicaragua, and shall run along its right bank to a point 3 English miles distant from Castillo Viejo, measured from the outside fortifications of said Castillo down to that point. Thence in a curve of 3 English miles distance, whereof the fortifications form the center to a point above Castillo 2 miles distant from the river's bank; thence following towards the river Sapoa that flows into Lake Nicaragua, running a line always 2 miles distant from the right bank of river San Juan with its windings to its origin from the lake and from the right bank of the lake to said river Sapoa, striking it parallel with the lake shore. From that point where river Sapoa is met, distant as aforesaid 2 miles from the lake, a straight astronomical line shall be drawn to the central point of Salinas Bay on the South Sea (Pacific Ocean), where the demarkation of the territories of the two contracting Republics shall end.

ARTICLE III.

Measurements corresponding to this dividing line shall be made, in whole or in part, by commissioners of the two Governments, these being agreed for fixing the time necessary for the operation. The said commissioners shall have the power to deviate somewhat from the curve around Castillo; from the line parallel with the shores of the river and the lake, or from the straight astronomical line between Sapoa and Salinas, in case that they can agree upon this, in order to find natural landmarks.

ARTICLE IV.

The Bay of San Juan del Norte, as well as that of Salinas, shall be common to both Republics, and consequently so shall be their advantages and the obligation to unite in their defense. Costa Rica shall likewise be bound for the portion belonging to her on the shores of the river San Juan on the same terms that Nicaragua is by treaties to unite in regarding it, in the same manner that the two Republics shall unite in its defense in case of attack from without, and they shall do so with all the efficacy in their power.

ARTICLE V.

During the time that Nicaragua may not recover full possession of all her rights in the port of San Juan del Norte,

the Punta de Castilla shall be used and possessed entirely in common by Nicaragua and Costa Rica alike, the whole passage of the Colorado river being designated as its boundary, so long as this community of use and possession lasts. It is further agreed that so long as the said port of San Juan may exist classified as *free*, Costa Rica shall not collect from Nicaragua port dues at Punta de Castilla.

ARTICLE VI.

The Republic of Nicaragua shall have exclusive dominion and supreme control of the waters of the river San Juan from its outlet from the lake until it empties into the Atlantic; but the Republic of Costa Rica shall have perpetual rights, in the said waters, of free navigation from the river's mouth to three English miles below Castillo Viejo for the purposes of commerce, whether with Nicaragua or the interior of Costa Rica, by way of the rivers San Cárlos or Sarapiqui or any other route proceeding from the tract on the shores of San Juan that may be established as belonging to this Republic. The vessels of both countries may indiscriminately approach the shores (atracar) of the river where the navigation is common to both, without the collection of any class of impost unless so established by the two Governments.

ARTICLE VII.

It is agreed that the territorial division made by this treaty shall in nowise be understood as counteracting obligations subscribed to, whether under political treaties or under contracts for a canal (*canalizacion*) or transit made on the part of Nicaragua before this present agreement; it shall rather be understood that Costa Rica assumes those obligations in the tract (*parte*) belonging to her territory, without in any way interfering with the eminent domain and sovereign rights held by her over the same.

ARTICLE VIII.

If the contracts for a canal or for transit made before Nicaragua's knowledge of this agreement should become incapable of duration, through whatever cause, Nicaragua binds herself not to conclude any other for the said objects without first having the opinion of the Government of Costa Rica

in regard to the disadvantages that the negotiation might possess for the two countries, provided that this opinion be delivered within thirty days after the reception of the proposal. In case Nicaragua should state the proposition to be urgent, and the natural rights of Costa Rica not to be injured by the negotiations, this advice shall be consultative (*este voto será consultivo*).

ARTICLE IX.

For no purpose, nor in the event of actual war, in which the two Republics of Nicaragua and Costa Rica should unhappily find themselves, shall they be permitted to practice any act of hostility towards each other in the port of San Juan del Norte, nor on the river of that name nor the Lake of Nicaragua.

ARTICLE X.

The stipulation in the foregoing article being essentially important for the protection of the port and river against foreign aggressions, which would affect the general interests of both countries, its strict fulfilment is agreed to under the special guaranty, which, in the name of the mediating Government, its minister plenipotentiary here is directed to give, and in effect does give, by virtue of the powers which, for this purpose, he states have been conferred on him by his Government.

ARTICLE XI.

In testimony of the good and cordial understanding which is established between the Republics of Nicaragua and Costa Rica, they renounce all assets (*credito activo*) that may exist between them, under whatever title, until the signing of the present treaty, and the high contracting parties likewise cancel all claims for indemnity to which they may consider themselves entitled.

ARTICLE XII.

This treaty shall be ratified and its ratifications exchanged within forty days after it is signed at Santiago de Managua.

In testimony whereof we sign this in triplicate, together with the honorable minister from Salvador, the respective secretaries countersigning, in the city of San José, the cap-

ital of Costa Rica, on the fifteenth day of April, eighteen hundred and fifty-eight.

MÁXIMO JEREZ,
JOSÉ M. CAÑAS,
PEDRO RÓMULO NEGRETE.

Secretary of the Legation of Nicaragua,
MANUEL RIVAS.

Secretary of the Legation of Costa Rica,
SALVADOR GONZALES.

Secretary of the Legation of Salvador,
FLORENTIN SOUZA.

Additional Act.

The undersigned, ministers of Nicaragua and Costa Rica, desiring to give public testimony to their high esteem and their grateful sentiments for the Republic of Salvador, and for its worthy representative, Señor Colonel Don Pedro R. Negrete, agree to annex to the treaty of territorial boundaries the following formal declaration:

The Government of Salvador having given to that of Costa Rica and that of Nicaragua the most authentic testimony of its noble sentiments and of its knowledge how fully to appreciate and to cultivate the fraternal sympathy which is shared by all these Republics, interesting itself so efficiently and amicably in the equitable adjustment of the differences which unfortunately have existed between the high contracting parties, and obtained this happy result through the legations of both, due in great measure to the estimable and active offices with which the honorable Señor Negrete, minister plenipotentiary of that Government, designated with the greatest fitness for using his generous mediation, has known perfectly how to meet its intentions, and due also to the important intelligence and impartial views of the said Señor *Ministro* in the discussion of the matters concerning the proper settlement: We, the Chargés of the Legations of Costa Rica and Nicaragua, in the name of our respective constituents, fulfil the pleasing duty of hereby declaring and subscribing to all the gratitude so justly merited by the patriotic zeal, enlightenment, fraternity, and benevolence which characterize the Government of Salvador.

In testimony whereof we sign these presents in triplicate, in the presence of the honorable Minister from Salvador, the respective ministers countersigning, in the city of San José,

the Capital of Costa Rica, on the fifteenth day of the month of April, in the year of our Lord eighteen hundred and fifty-eight.

MÁXIMO JEREZ.
JOSÉ M. CAÑAS.

The Secretary of legation of Nicaragua,
MANUEL RIVAS.

The Secretary of legation at Costa Rica,
SALVADOR GONZALES.

APPENDIX "C."

Decree of the Constitutional Assembly of December 1, 1857, *declaring its Legislative Faculties.*

SOLE ARTICLE.—The Constitutional Assembly, in addition to those attributes with which it is invested to legislate, has the power to exercise all others which were conferred by the Constitution of 1838 upon both chambers, whether acting jointly or separately, in all cases of emergency.

Decree of the Constitutional Assembly in its Legislative Character, approving the Treaty of June 4, 1858.

The Constitutional Assembly of the Republic of Nicaragua, in exercise of the legislative faculties with which it is invested, decrees—

SOLE ARTICLE.—The treaty of limits, celebrated in the city of San José on the 15th of April, of the present year, between the ministers plenipotentiary, General Don Máximo Jerez on the part of this Republic, and General Don José María Cañas on the part of Costa Rica, with the intervention of the minister plenipotentiary of the Government of Salvador, Colonel Don Pedro R. Negrete, is approved.

APPENDIX "D."

Message of the State Department of Nicaragua to the Senate of Nicaragua, giving history of the Boundary Negotiations with Costa Rica.

SECRETARYSHIP OF FOREIGN AFFAIRS OF THE GOVERNMENT OF NICARAGUA,
MANAGUA, *January* 8, 1876.

To the Honorable SECRETARIES OF THE SENATE:

GENTLEMEN: I have the honor to send to you the correspondence between this Cabinet and that of Costa Rica about

the boundary questions and the invalidity of the treaty of the 15th of April, 1858.

You will observe that the Cabinet of Costa Rica refuses to acknowledge the duties that were imposed upon that Government by the treaty of the 30th of July, 1868; not only denies the existence, fully authenticated, of the rights of Nicaragua, but also refuses to accept the only means of solving this difficulty—an impartial arbitration.

And as an injustice is always accompanied by an absurdity, that Cabinet argues in defense of its position the very question that is in dispute, that is to say, that the territory in question belongs to Costa Rica. In that way the Government of Costa Rica assumes the extraordinary faculty of defining its own rights in the matter and imposing upon Nicaragua the obligation of acknowledging them, without taking into consideration the friendly ties that exist between the two countries, which have been guaranteed by an international convention, and in so doing places both Republics in a violent and strained position.

In order to establish its pretended sovereignty over the territory in question, that Government argues that the people of Guanacaste (Nicoya) voluntarily united with Costa Rica, and besides that, the same territory was annexed to it by a resolution of the Federal Congress of Central America. It is convenient in this connection to bring to memory some historical facts.

After the independence of the Kingdom of Guatemala, the District of Nicoya remained united to Nicaragua, and this was admitted by Costa Rica, for in her Constitution of the 21st of January, 1825, she established as the limit between the two States the river del "Salto." This is a fact that cannot be disputed.

The pernicious influence of the old employés of the Spanish Government and the inexperience of the political parties formed in the first days of the Republic, placed Nicaragua in disastrous anarchy. Under such unpleasant circumstances the first Central American Congress met. Costa Rica sent to it her deputies. Nicaragua could not do so. The representatives of Costa Rica, taking advantage of this opportunity, solicited the annexation of Guanacaste to their State; but the Congress, acknowledging the misfortunes under which Nicaragua was laboring, did not receive the above proposition with much favor, and it simply declared by de-

cree of the 9th of December, 1825, that said district would remain under the rule of Costa Rica until the demarkation of the territories of the States was made. The request of Costa Rica and the resolution of the Congress demonstrated that at the time of the independence, Guanacaste did not belong to Costa Rica.

This provisional state of things established by the Congress was legally altered. The assembly of Nicaragua met in 1826. Nicoya, acknowledging its old mother country, joined with the District of Nicaragua (now the Department of Rivas) in the election of a deputy, according to the decree of the 5th of May, 1824. Neither Costa Rica nor the Federal Congress expressed any disapprobation of this act. One of the first resolutions of the Assembly was to protest before the Congress against the provisional annexation of Nicoya. Costa Rica then endeavored to make the District accept her Constitution, but the people refused to do so in a declaration dated the 15th of August, 1826, arguing that the annexation had been only provisional, and that the protest of the Assembly to the resolution of the Federal Congress was pending; also protesting against the annexation.

The civil war, which had not completely ceased at that time, received new impulse in the years 1827 and 1828, and in the year 1829 three of the five States united to make war against the National Government, resulting in the change of the administration, but not securing the quietude that the stability of the country needed. The constant state of disturbance in which Central America remained was the reason why the Congress could not dictate any resolution about the limits of the States—a measure which, under the circumstances, undoubtedly would have complicated the situation still more. In the meantime Costa Rica, favored by public disturbances, was in possession of Nicoya, and still is in possession of this territory, comforted that the moderation with which Nicaragua has always treated this unpleasant affair is a guarantee to her.

With this object, and by order of the President of the Republic, I beg you to place the present before the Honorable Chamber with all the documents that accompany it, so that it will be pleased to mark to the Government the conduct that must be followed in this affair.

I have the honor to subscribe myself your most obedient servant,

THOMAS AYON.

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